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JUL 19 1971
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No. 70-300

In the Supreme Court of the United States

OCTOBER TERM, 1971

NEZ PERCE TRIBE OF INDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A 1a–13a) is not yet reported. The opinion of the Indian Claims Commission (Pet. App. B 14a–33a), rendered on remand from the Court of Claims, 176 Ct. Cl. 815, certiorari denied, 386 U.S. 984, after reversal of the Commission's earlier decision, 13 Ind. Cl. Comm. 184, is reported at 22 Ind. Cl. Comm. 53.

JURISDICTION

The judgment of the Court of Claims was entered on March 19, 1971. The petition for a writ of certiorari was filed on June 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1255. See Sec-

438-720—71

tion 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70s(c).

QUESTION PRESENTED

Whether petitioner is entitled to the payment of interest on the amount awarded to it by the Indian Claims Commission as additional compensation for lands ceded to the United States by an 1894 agreement.

STATUTE INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1050, 25 U.S.C. 70a, provides in part:

> The Commission shall hear and determine the following claims against the United States * * * (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity * * *.

STATEMENT

On December 4, 1957, the Nez Perce Tribe filed a petition with the Indian Claims Commission to recover additional consideration for the 549,559 acres of land in Northern Idaho that it had ceded to the United States by the Agreement of May 1, 1893, approved and ratified by the Act of August 15, 1894, 28 Stat. 286, 326–332, 1 Kappler 536. The Tribe claimed that the amount paid pursuant to the Agreement was "unconscionable". See Section 2, Indian

Claims Commission Act, 25 U.S.C. 70a. Article III of the Agreement (Pet. App. D 52a) provided that, in consideration of the lands ceded, the United States would pay to the Nez Perce Indians the sum of $1,626,222; of this, $626,222 was to be paid to the Indians "as soon as practicable after the ratification of this agreement," and the balance of $1,000,000 was to be deposited in the Treasury of the United States to the credit of the Nez Perce "and shall bear interest at the rate of five per centum per annum." The sum of $50,000 was to be paid out to the Indians per capita at the expiration of the first year and, semi-annually thereafter, $150,000 "with the interest on the unexpended portion of the fund of one million dollars until the entire amount shall have been paid * * *." Under the terms of the Agreement, the compensation paid totalled $1,634,664, or $2.97 per acre. 13 Ind. Cl. Comm. 184, 185. The terms of the Agreement were carried out. The Court of Claims and the Commission agreed that there had been no fraud, duress or unfair or dishonorable dealings in connection with its negotiation (Pet. App. C 36a).

In its first decision, the Commission dismissed the petition, finding that with respect to the 549,559 acres of ceded land "the fair market value could not have exceeded $4.00 per acre." 13 Ind. Cl. Comm. at 236; cf. 176 Ct. Cl. 815, 819 (Pet. App. C 35a). On appeal, the Court of Claims ordered the case remanded to the Commission for further consideration of the "value" question; however, the court rejected the

Tribe's contention that interest should be awarded on whatever sum the Commission might determine the proper value to be (Pet. App. C 47a–48a). This Court denied the Tribe's petition for a writ of certiorari. 386 U.S. 984.

Upon remand, the Commission raised the "value" per acre from $4 to $5.50 (Pet. App. B 16a–17a) and, disagreeing with the Court of Claims, held that the Tribe was entitled to interest. Accordingly, the Commission awarded additional consideration in the amount of $1,387,911 and interest on that sum at 5 percent from August 15, 1894, to the date of payment (Pet. App. B 27a). The Commission calculated the interest through the date of judgment as $5,222,015.14.[1] Two commissioners dissented on the interest question (Pet. App. B 28a–33a).

On appeal by the government, the Court of Claims reversed the Commission's judgment insofar as it granted interest on the added consideration (Pet. App. A 1a).

ARGUMENT

The decision of the Court of Claims that the Tribe is not entitled to interest on the additional consideration awarded by the Commission is correct. This Court has consistently held that the United States is not liable for interest on claims against it, unless Congress expressly directs otherwise. See *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585; *United States* v. *N.Y. Rayon Co.*, 329 U.S. 654; *United*

[1] This order was not included in the Appendix to petitioner's brief. It is included as an appendix to this brief, *infra*, pp. 1a–3a.

States v. *Goltra,* 312 U.S. 203. As the Court pointed out in *Peoria Tribe* v. *United States,* 390 U.S. 468, 470, this general rule "has been held to be fully applicable to the claims of Indian tribes." See *United States* v. *Alcea Band of Tillamooks,* 341 U.S. 48.

In prior cases involving an award based on the "unconscionable consideration" provision of Section 2 of the Indian Claims Commission Act, 25 U.S.C. 70a, the Court of Claims has held, as it did in this case, that the United States is not liable for interest on the award. See *Osage Nation* v. *United States,* 119 Ct. Cl. 592, 97 F. Supp. 381, certiorari denied, 342 U.S. 896; *Kiowa, Comanche and Apache Tribes* v. *United States,* 143 Ct. Cl. 534, 543–544, 163 F. Supp. 603, 609–610.

Petitioner contends, however, that the decision of this Court in *Peoria Tribe* v. *United States, supra,* dictates a contrary result. In *Peoria,* the treaty required that the lands there involved "be sold at public auction by the United States for the Tribe's benefit" and further provided that since the annual receipts could not be ascertained, the President and the tribe were to determine "how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement." 390 U.S. at 469. But the lands were not sold at public auction; instead, they were sold at private sales at appraised prices lower than would have prevailed at public auction. 390 U.S. at 470. The

Court held the United States liable for interest on the difference between the amount realized on the private sales and the amount that would have been realized had the land been sold at public auction as the treaty required. In so holding, the Court said in the clearest terms that it was not departing from the general rule that the United States is not liable for interest on claims against it (390 U.S. at 470–471):

> But this is not a case where the Court is asked to exercise "the power to award interest against the United States," *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 663. The issue, rather, concerns the measure of damages for the treaty's violation in the light of the Government's obligations under that treaty.

In other words, since the amount that would have been realized if the sales had been at public auction would have been placed in a separate fund, and since, under the terms of the treaty, the United States was required to pay interest on this, the proper measure of damages for breach of the treaty included interest on the amount awarded.

That is not the situation in this case. Here, the treaty, which the United States complied with, required the government to pay a fixed sum of $1,626,222, of which $1,000,000 was to be deposited in the Treasury to draw interest at 5 percent (Article III, Pet. App. D 52a). As the Court of Claims pointed out in its earlier decision (Pet. App. C 48a):

> * * * In determining whether the Agreement should be read so as to give appellant interest on the difference between the price paid and the

> fair market value, it is not enough for us to be able to say that *probably* a large payment would have been put into the trust. Article III did not make the trust open-ended. It was to receive "the remainder" of a specific sum. What would have happened had the sum been larger it is impossible for us to say. This is not a case like the *Pawnee Tribe* v. *United States*, 56 Ct. Cl. 1, 15 (1920), in which this Court awarded interest on an amount which the agreement specified but which the United States had for some unknown reason never paid. 27 Stat. 612, 644. The Agreement here specified a sum to bear interest, and that sum apparently was paid and did bear interest; the sum claimed here is over and above the amount specified in the Agreement. In short, the Agreement has reference only to the amount that was actually agreed upon and gives no warrant for reading in a requirement that any sum determined in the future to be the fair market value should bear interest.

Since this is not a case involving the proper measure of damages for breach of a treaty and since, in any event, the terms of the treaty provide only for interest on a specified sum, which has been paid by the United States, the Court of Claims correctly ruled that the Tribe was not entitled to interest on the additional compensation awarded, in the absence of an express statutory provision waiving the established rule that precludes such recovery. See *United States* v. *N.Y. Rayon Co.*, 329 U.S. 654, 659.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
RALPH A. BARNEY,
RAYMOND N. ZAGONE,
Attorneys.

JULY 1971.

APPENDIX

Before the Indian Claims Commission

Docket No. 175–B

THE NEZ PERCE TRIBE OF INDIANS, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Order Amending Findings of Fact and Entering Conclusions of Law

Upon its own motion and in compliance with the decision of the Court of Claims in the subject case, being Appeal No. 5–64, decided July 15, 1966, 176 Ct. Cl. 815, *cert denied* 386 U.S. 984 (1967) and for the reasons set forth in the opinion this date filed herein, the Commission orders:

(1) That Finding of Fact No. 26, entered on April 7, 1964, be stricken and there be set forth in lieu thereof the following:

> 26. Based on all the evidence of record in this case and upon the findings of fact entered herein, the Commission finds that the subject area had a fair market value, as of August 15, 1894, of $3,022,575.00, or an average per acre value of approximately $5.50.

(2) That Finding of Fact No. 27, entered on April 7, 1964, be stricken.

It is further ordered, that all other findings of fact entered by this Commission on April 7, 1964, are re-entered and affirmed.

It is further ordered, that the following conclusions of Law be entered:

Conclusions of Law

The consideration paid by the defendant for the cession was $1,634,664.00 or an average of about $2.97 per acre. This leaves a difference of $1,387,911.00 in the fair market value of the tract and the amount paid for the cession. Accordingly, the lands were worth about 80% more than the consideration which was paid the plaintiff. The Commission concludes that the consideration of $1,634,664.00 paid to the plaintiff for the cession of its lands having a fair market value of $3,022,575.00 was so grossly inadequate as to make the consideration unconscionable.

Under the provisions of Article 3 of the Nez Perce Agreement (28 Stat. 286, 326–332, 1 Kappler 536), the plaintiff was entitled to have interest on that portion of the consideration which was not immediately paid. The Commission concludes that the plaintiff is likewise entitled to have interest on that portion of the revised treaty consideration which it never received. Acordingly, plaintiff is entitled to an additional amount required by Article 3 of the agreement, measured by simple interest at the rate of 5% per annum on $1,387,911.00 from the date of the ratification of the agreement, August 15, 1894, to the date of payment of said $1,387,911.00.

Since the parties have agreed that there are no gratuitous offsets to be claimed in this case, the plaintiff is entitled to entry of a final award.

The interest through the date of this judgment amounts to $5,222,015.14. Accordingly, the plaintiff is entitled to an award in the amount of $6,609,926.14 plus simple interest at the rate of 5% per annum on the principal sum of $1,387,911.00 from November 15, 1969, to the date of payment of said principal sum.

Dated at Washington, D.C., this 14th day of November, 1969.

MARGARET H. PIERCE,
Commissioner.
JOHN T. VANCE,
Commissioner.
BRANTLEY BLUE,
Commissioner.

Concurring except as to award of interest:
JEROME K. KUYKENDALL,
Chairman.
RICHARD W. YARBOROUGH,
Commissioner.

U.S. GOVERNMENT PRINTING OFFICE: 1971